No. 781

FILED
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HAROLD B. WILLEY, Cl

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 11,638.

SIDNEY SARNER, LEONARD SARNER, MAURICE SARNER, and LINWOOD PARK, INC., Sections 1 to 13 Inclusive, Each a Corporation of New Jersey,
Appellants-Petitioners,

v.

NORMAN P. MASON, Commissioner of the Federal Housing Administration, and ALBERT M. COLE, Housing and Home Financing Administrator, and FEDERAL HOUSING ADMINISTRATION,
Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

PETITION FOR A REHEARING.

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Attorneys for Appellants-Petitioners,
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Newark 2, New Jersey.

WALTER D. VAN RIPER,
Of Counsel.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

To the Honorable Judges of the United States Court of Appeals for the Third Circuit.

The Petition of Appellants, SIDNEY SARNER, LEONARD SARNER, MAURICE SARNER, and LINWOOD PARK, INC., Sections 1 to 13 inclusive, each a Corporation of New Jersey, respectfully shows:

I.

Summary Statement of the Matter Involved.

Petitioners (Appellants) appealed from a judgment of the United States District Court for the District of New Jersey entering summary judgment against the Petitioners (Appellants) and finding that a "default" had occurred under the terms of the Charter of incorporation in three instances, namely:

(1) The purchase by the corporation of some of its own stock and carrying the same as Treasury stock.

(2) The making of loans to a shopping center corporation and a recreation center corporation.

(3) A refusal to answer a questionnaire.

This Court, by its opinion of December 21st, 1955, affirmed the judgment of the District Court as to the third alleged "default" as above mentioned. No opinion was rendered on the other points raised by the Petitioners (Appellants).

II.

Reasons for the Allowance of a Rehearing.

1. A determination of the other issues involved is necessary for the future guidance of all parties to the litigation.

Counsel desire to state very frankly to the Court that they are in doubt as to the procedural accuracy of filing this Petition. They feel compelled to do so for the following reasons:

(1) This Court found that the Petitioners (Appellants) had refused to answer the questionnaire. It has been our contention that all of the information requested by the questionnaire had been supplied to the Federal Housing Administration either by the periodical statements furnished to it and/or by its examination of the Petitioners' (Appellants') corporation books.

However, since this Court has found as a matter of fact that Petitioners (Appellants) have refused to answer the questionnaire and declared that to be a "default" within the terms of the Charter, we do not press that point further. An accountant is now engaged in the preparation of the answers to the questionnaire and it is anticipated that the same will be filed within a matter of days, and thus this "default" will have been cured.

(2) Under the terms of the Charter (para. 7), when a "default" has been cured, the common stockholders have the authority to remove the Directors elected by the preferred stockholders (meaning the present Directors in the instant case), and elect Directors of their own choosing.

(3) We contemplate that when this procedure is attempted by the Petitioners (Appellants) after the filing of the questionnaire, we will be confronted with the claim by the Defendants herein that they have a summary judgment of the District Court finding that two other "defaults" have occurred. As the situation now stands, of course, this judgment has neither been affirmed nor reversed.

(4) Our procedural difficulty, as referred to above, lies in the fact that we are uncertain whether or not if the situation should develop, as above indicated, we would then be in a position to come to this Court and ask for a decision on the remaining parts of the District Court judgment. If we were not able to do so, it would probably mean that we were being bound by the summary judgment without the benefit of the judgment of this Court, and as we see it at the moment, without any further right to appeal because of the lapse of time.

Conclusion.

We, therefore, file this Petition within time in order that the matter may be retained within the jurisdiction of the Court for such further action as may be warranted and in the hope that we may have the guidance of the Court as to procedure.

Respectfully submitted,

VAN RIPER & BELMONT,
Attorneys for Petitioners (Appellants),
By: WALTER D. VAN RIPER.

Dated: December 30th, 1955.

Certificate.

I, Walter D. Van Riper, a member of the firm of Van Riper and Belmont, attorneys for the Petitioners (Appellants) herein, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for the purpose of delay.

Dated: December 30th, 1955.

WALTER D. VAN RIPER.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 781

SIDNEY SARNER, LEONARD SARNER, MAURICE SARNER, AND LINWOOD PARK, INC., SECTIONS 1 TO 13 INCLUSIVE, EACH A CORPORATION OF NEW JERSEY, PETITIONERS

v.

NORMAN P. MASON, COMMISSIONER OF THE FEDERAL HOUSING ADMINISTRATION, AND ALBERT M. COLE, HOUSING AND HOME FINANCE ADMINISTRATOR, AND FEDERAL HOUSING ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court for the District of New Jersey denying plaintiffs' motion to remand (Pet. App. 25–30) is reported at 128 F. Supp. 165. The memorandum opinion of that court granting defendants' motion for summary judgment (Pet. App. 31–36) is not reported. The opinion of the Court of Appeals

for the Third Circuit (Pet. App. 37–42) is reported at 228 F. 2d 176.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 1955 (Pet. App. 42). A petition for rehearing was denied on January 10, 1956. The petition for a writ of certiorari was filed on March 21, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an action instituted in a state court against the Commissioner of the Federal Housing Administration is properly removable to the appropriate federal district court.

2. Whether the courts below correctly held that petitioners' charters required them to comply with a Federal Housing Administration request for information and that, accordingly, their refusal to comply justified action by the Commissioner of that agency, under the charters, to replace existing boards of directors.

STATUTES INVOLVED

Section 1 of the National Housing Act, 48 Stat. 1246, as amended, 49 Stat. 722, 12 U. S. C. 722; and the relevant portions of 28 U. S. C. 1441 and 1442 are set forth in the Appendix, *infra*, pp. 15–16.

STATEMENT

This action was brought in the Superior Court of Bergen County, New Jersey, by the Sarner

associates and the several corporations in which they controlled the common stock, seeking to enjoin the respondents from holding meetings of the preferred stockholders of the corporations, at which meetings the existing boards of directors were to be replaced. The case was removed to the New Jersey District Court, which denied remand and subsequently entered summary judgment for respondents. The Court of Appeals for the Third Circuit affirmed. The pertinent facts, as found by the district court and as shown by the record,[1] may be summarized, as follows:

The various corporations, Linwood Park, Inc., Sections 1 to 13 inclusive, were incorporated, respectively, under charters granted by the State of New Jersey. They were organized for the purpose of constructing and operating housing projects pursuant to the provisions of Section 608 of Title VI of the National Housing Act, as amended, 56 Stat. 303, 12 U. S. C. 1743. The articles of incorporation authorized the issuance of three hundred shares of capital stock, one hundred shares of "preferred stock" and two hundred shares of "common capital stock." (Pet. App. 31). Pursuant to the provisions of the National Housing Act, all of the preferred stock of the corporations was purchased by the Federal

[1] The record in this Court consists of the appendices filed by the parties in the court of appeals. References to the record will be designated as "Appellant's App." and "Appellee's App.," respectively.

Housing Administration (Pet. App. 31) which was to insure repayment of loans made by the corporations from private parties to construct projects (Appellant's App. 5–6). The common stock of the corporations was acquired by Sidney Sarner and Ralph J. Solow. Each paid $6,500 for the common stock so that their total investment at the time the corporations commenced doing business in 1949 was $13,000. (Pet. App. 32.)

The corporate charters gave the holders of the preferred stock the right to remove existing directors and to elect new ones in the event of the creation or existence of any of the defaults specified in the certificate of incorporation (Pet. App. 32). Each certificate provided in pertinent part, as follows (Pet. App. 32–34):

> Sixth: The corporation shall not without approval of the holders of a majority of the shares of preferred stock * * * redeem or cancel any of its shares of preferred stock, or effect any changes whatsoever in its capital stock; alter or amend the certificate of incorporation or fail to establish and maintain reserves as set forth in this certificate of incorporation.
>
> Seventh: (a) The happening of any of the following events shall constitute a default within the meaning of that word as used in this certificate: * * * (4) the failure of the corporation, continuing for a period of fifteen days, to perform any of the covenants, conditions or provisions required by it to be performed by this cer-

tificate, the By-Laws of the corporation, the Mortgage, or any contract to which the corporation and the Commissioner shall be parties, or fail to carry out in full the terms of any agreement whereby the loan covered by the insured mortgage is to be advanced or the project is to be constructed and operated.

* * * * *

Eighth: * * * (f) At the request of the Commissioner, or of the holder of a majority of shares of the preferred stock * * *, the corporation shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation and condition of the property and the status of the insured mortgage and any other information with respect to the corporation or its property which may be requested.

In August of 1950, each of the corporations purchased the shares of common stock held by Solow for sums aggregating $1,318,425.16. This stock is carried on the corporate books as "Investments—Treasury Stock." These purchases were made without prior approval of holders of a majority of the shares of the preferred stock. (Pet. App. 34.)

Subsequently, in 1951, the corporations collectively made long-term, unsecured loans in the amount of $1,270,000 to three corporations whose common stock was owned and controlled by Sidney Sarner. These corporations, Linwood Park

Business Center, Inc., Linwood Park Business Center, Inc., Section 1, and Linwood Park Recreation Center, Inc., had been organized for the purpose of erecting and maintaining buildings for a shopping and recreation center near the aforementioned rental housing projects. (Pet. App. 35.) The latter three corporations were independent of and were not under the control of the plaintiff corporations in which the Federal Housing Administration held the preferred stock (Appellant's App. 40).

In June of 1954, following an investigation by the Senate Committee on Banking and Currency of certain credit abuses by corporations which had availed themselves of FHA insured credit, a questionnaire was sent by the Commissioner of the Federal Housing Administration to all mortgagors who had obtained credit under Section 608 of Title VI of the National Housing Act (Pet. App. 40). The corporate petitioners were among such mortgagors (Appellant's App. 41). The questionnaire, among other things, requested information as to the actual costs of the projects secured by FHA credit and the disposition of the difference, if any, between the amounts of the mortgages and the actual costs (Appellee's App. 26–27). Data as to land costs and actual construction costs were called for, as were total amounts of subcontracts and various other items of importance to the FHA (Appellee's App. 26–27). On July 29, 1954, Sidney Sarner, an officer

of these corporations and the person substantially in charge of their management, addressed a letter upon the stationery of the "Sarner Management Co." to the FHA, which after acknowledging receipt of the questionnaires, contained the following statement (Appellee's App. 30):

> That information which is your right has been rendered to you in our annual statements. Our books are available to you to substantiate their truth, beyond such, we cannot abide in your request. Regarding the dividend and the stock redemption, our charter established our rights. Wherein your directive is to the contrary, we cannot be expected to comply with the same.

On August 28, 1954, respondent Mason, Commissioner of the Federal Housing Administration, and holder of all of the preferred stock of the corporations, mailed to each of the thirteen corporations a registered letter notifying them of proposed meetings of their preferred stockholders for the purpose of replacing the existing boards of directors (Appellant's App. 9). The notification stated that the corporations had violated their charters and FHA regulations by effecting unauthorized redemptions of common stock, by making unapproved long-term loans, and by refusing to furnish information and data requested by the FHA in its questionnaires (Appellant's App. 15–16). Accordingly, the corpora-

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tions were informed that the Commissioner, pursuant to the charter provisions of each corporation, proposed to call meetings of the preferred stockholders for the purpose of electing new boards of directors (Appellant's App. 15).

At this point, petitioners brought suit in the Chancery Division of the Superior Court of Bergen County, New Jersey, to enjoin respondents from holding the proposed preferred stockholders' meetings (Appellant's App. 3–14). This action was removed to the United States District Court for the District of New Jersey (Appellant's App. 19–23), whereupon motion was made by petitioners to remand (Appellant's App. 25–26), and motion was made by respondents to dismiss, or in the alternative for summary judgment (Appellant's App. 34).

The district court denied the motion for remand, rejecting petititoners' contention that Section 1 of the National Housing Act, as amended, *infra,* p. 15, which authorizes the Commissioner to sue and be sued in any court of competent jurisdiction, state or federal, precluded application of the removal statutes to this case, and holding that removal was proper under 28 U. S. C. 1441 and 1442 (a) (1), *infra,* pp. 15–16 (Pet. App. 25–30). Thereafter, the district court entered summary judgment for the respondents (Appellant's App. 42–43), holding that under the terms of the charters and on the undisputed facts presented, there had been three separate defaults

by the corporate plaintiffs as alleged by the respondents[2] (Pet. App. 34–36).

On appeal, the court of appeals ruled that the case was properly removable to the federal court under 28 U. S. C. 1442 (a) (1) and that Section 1 of the National Housing Act did not preclude application of the removal statutes (Pet. App. 38–39). It held that the failure of the corporate plaintiffs to furnish the information requested in the Commissioner's questionnaires was a patent breach of their charters and therefore a default which justified the Commissioner in calling meetings of the holders of their preferred stock for the purpose of electing new directors, and that the lack of a material factual issue with respect to that default fully warranted the district court in entering summary judgment. In view of its holding, the court found it unnecessary to discuss the other two defaults alleged by the respondents. (Pet. App. 42.)

ARGUMENT

1. Petitioners' contention that the removal of this case to a federal district court was improper is without merit. The district judge found an adequate basis for removal under 28 U. S. C. 1441, *infra*, pp. 15–16, in the presence in the controversy

[2] Respondents alleged in the district court that there had been three separate defaults by the corporate plaintiffs, as follows: (1) an unauthorized redemption of common stock; (2) the making of certain unapproved long-term loans; and (3) a refusal to furnish information and data requested by the Federal Housing Administration (Pet. App. 40).

of the required jurisdictional amount, the existence of a substantial federal question, and the necessary diversity of citizenship (Pet. App. 28–30). He then recognized (Pet. App. 30) that 28 U. S. C. 1442 (a) (1), *infra*, p. 16, which permits removal of suits brought against federal officers because of acts done by them under color of their office, afforded another ground for removal. In affirming the judgment of the district court, the court below rejected petitioners' argument that the case presented no federal question and then held that removal was clearly authorized by 28 U. S. C. 1442 (a) (1) (Pet. App. 38–39).

The rejection by both courts below of petitioners' motion to remand is in accord with uniform decisions which have dealt with similar questions of removal jurisdiction. *Perpetual Building & Loan Ass'n., et al.* v. *Series Directors, et al.*, 217 F. 2d 1 (C. A. 4), certiorari denied, 349 U. S. 911 (12 U. S. C. 1716 (c)); *Machine Tool and Equipment Corp.* v. *R. F. C.*, 131 F. 2d 547 (C. A. 9) (15 U. S. C. 603 (a)); *Sabin* v. *H. O. L. C.*, 147 F. 2d 653 (C. A. 10), certiorari denied, 326 U. S. 759 (12 U. S. C. 1463 (a)). Where Congress intends to cut off access to removal procedures, it manifests that intention by enacting a specific provision to that effect. See 28 U. S. C. 1349, 1445, 12 U. S. C. 1138, 15 U. S. C. 77v (a). Cf. *Pacific Railroad Removal Cases*, 115 U. S. 1; *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476; *Federal Intermediate Credit Bank* v. *Mitchell*, 277 U. S.

213, 217. Petitioners contend that under the principle announced in the case of *F. H. A.* v. *Burr*, 309 U. S. 242, Section 1 of the National Housing Act should be construed as precluding the removal of the instant case to the federal court. The contention is without substance. That case, which merely reiterates the rule that a statute waiving sovereign immunity is to be liberally construed, is inapposite here. The instant case does not involve a question concerning initial amenability of a federal agency to suit, and there is, therefore, no occasion to consider the rule discussed in the *Burr* case or to apply it to removal procedures in an already existing suit.

Petitioners do not argue that Section 1 of the National Housing Act, the amenability-to-suit provision applicable here, bars removal under 28 U. S. C. 1441; they contend only that it bars removal under 28 U. S. C. 1442 (a) (1) (Pet. 20–22). In the absence of a statutory limitation on removal, and in view of the clear language of 28 U. S. C. 1442, *infra*, p. 16, the contention has no force. In any event, as the district court held (See *supra*, pp. 8, 9–10), removal was sustainable under 28 U. S. C. 1441, *infra*, pp. 15–16, as well as under 28 U. S. C. 1442 (a) (1).

2. It is plain that the case was properly disposed of below on the merits. The district court entered summary judgment on the basis of all of the three defaults committed by the corporate plaintiffs. The court of appeals, however, found

it necessary to examine only one of the said defaults, namely, the corporations' failure to supply the information requested by the FHA questionnaires.

The terms of the certificates of incorporation with respect to the default relied upon by the court of appeals are explicit. Section 7 (*supra*, pp. 4–5) provides that the failure of the corporation, continuing for fifteen days, to perform any of the covenants, conditions or provisions required by it shall constitute a default. And Section 8 (*supra*, p. 5) provides that the corporation shall at the request of the Commissioner furnish specified information concerning its affairs.

The corporations' refusal to furnish the information required by the FHA questionnaires in this case was clearly violative of the terms of their charters. The fifteen-day period had already expired when Sarner made his negative reply to the FHA on July 29, 1954, and the requested information had not been furnished at the time the court of appeals entered its final judgment in the matter. Hence, the holding of both courts below that petitioners were entitled to no relief was clearly correct.

3. Petitioners contend (Pet. 19–20) that the court below denied them due process of law by refusing to pass upon the first and second defaults alleged by respondents (See *supra*, fn. 2, p. 9). Section 5 of the charters (Pet. App. 32), which

permits the preferred stock holders in case of default to elect new directors, provides in addition that "When such default or defaults shall have been cured, the right to elect directors shall again vest in the holders of the common stock." Petitioners assert categorically (Pet. 19) that, after the court below decided the case against them, they cured the third default (See *supra*, fn. 2, p. 9), but that they are now faced with the district court's judgment based on findings that they committed the first and second defaults and have not had an appellate decision thereon. The third default had not been cured when petitioners filed their petition for rehearing in the court below. Nor had it been cured when the court entered its final judgment by denying their request for rehearing. Obviously, then, the court below was under no duty to pass upon the first and second defaults, since its decision on the third default was dispositive of the case. It was, of course, within petitioners' power at any time before the termination of the proceedings in the court below to furnish the information requested in the FHA questionnaire, thus clearing the way for an appellate decision on the other defaults. Apparently, they deemed it to their advantage not to do so. Having failed to cure the third default before the court made its final decision and having lost on that point, they are now in no position to make a belated effort to cure the default and then

contend that the court below erred in the first place in failing to render an advisory opinion on the other defaults.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

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Attorneys.

APRIL 1956.

APPENDIX

1. Section 1 of the National Housing Act, 48 Stat. 1246, as amended, 49 Stat. 722, 12 U. S. C. 1702, provides as follows in pertinent part:

> The President is authorized to create a Federal Housing Administration, all of the powers of which shall be exercised by a Federal Housing Administrator * * * The Administrator shall, in carrying out the provisions of this title and titles II and III, be authorized, in his official capacity, to use and be sued in any court of competent jurisdiction, State or Federal.

2. 28 U. S. C. 1441 provides as follows in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the refendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as

defendants is a citizen of the State in which such action is brought.

* * * * *

3. 28 U. S. C. 1442 provides as follows in pertinent part:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * *

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